(2)

No. 01-61

SEP 7 2001

IN THE

Supreme Court of the United States

THOMAS PEARSON and JOHN KOWALKOWSKI,
on behalf of themselves and all others similarly situated,

Petitioners,

v.

COMPONENT TECHNOLOGY CORPORATION, GENERAL ELECTRIC CAPITAL CORPORATION, and TIFD VIII-R INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS GENERAL ELECTRIC CAPITAL CORPORATION AND TIFD VIII-R INC.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this case merits review by this Court pursuant to its certiorari powers where the decision of the Third Circuit does not conflict with the decision of any other federal court and rests upon well-established principles of federal labor law.

2. Whether this case merits review by this Court pursuant to its certiorari powers where the outcome of the case would be the same under any of the tests previously applied by the courts of appeals for determining "employer" liability under the WARN Act.

CORPORATE DISCLOSURE

Respondent General Electric Capital Corporation ("GE Capital"), a Delaware corporation, is wholly owned by General Electric Capital Services Inc., a Delaware corporation. General Electric Capital Services Inc. is wholly owned by General Electric Company, a New York corporation. Respondent TIFD VIII-R INC. ("TIFD"), a Delaware corporation, is wholly owned by GE Capital Services Structured Finance Group, Inc., a Delaware corporation. GE Capital Structured Finance Group, Inc. is wholly owned by General Electric Capital Corporation.

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COUNTER-STATEMENT OF THE CASE

Petitioners' Statement of the Case includes numerous misstatements and material omissions of fact. Therefore, Petitioner's Statement of the Case should be viewed with caution to the extent that it is inconsistent with the facts set forth below. In addition, Petitioners' Appendices include numerous omissions and printing errors. The opinions of the district court and court of appeals in this case are accurately reproduced in the official reporters. The opinion of the district court may be found at *Pearson v. Component Technology Corp.*, 80 F. Supp. 2d 510 (W.D. Pa. 1999). The opinion of the Court of Appeals for the Third Circuit may be found at *Pearson v. Component Technology Corp.*, 247 F.3d 471 (3d Cir. 2001).

A. Procedural History

Petitioners are former employees of Component Technology Corporation ("Comptech"), a corporation previously engaged in the business of designing, manufacturing and assembling precision plastic products. Petitioners commenced this action against Comptech, GE Capital and TIFD on November 2, 1994 in the United States District Court for the Western District of Pennsylvania.[1] Petitioners' complaint alleged that Comptech had failed to provide its employees with prior notice of the closing of its plant in Erie, Pennsylvania, as required by the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.* (the "WARN Act"). Based upon allegations that GE Capital "directly controlled all

1. Hereinafter, GE Capital and TIFD are referred to collectively as the "GE Capital Defendants."

management decisions" of Comptech and that Comptech "was the equivalent to, and the alter ego of General Electric Capital Corporation and/or vice versa," Petitioners' complaint asserted that the GE Capital Defendants are also liable for Comptech's alleged violation of the WARN Act.

On May 18, 1995, the district court certified the case to proceed as a class action under FED. R. CIV. P. 23. The class consisted of former employees of Comptech who were terminated from employment as of October 14, 1994. No appearance was entered on behalf of Comptech, and, on May 30, 1995, the district court entered a default judgment against Comptech.

After the completion of discovery, the GE Capital Defendants and plaintiffs filed cross-motions for summary judgment. On December 17, 1999, the district court entered a Memorandum Opinion and Order granting the GE Capital Defendants' motion and denying plaintiffs' cross-motion. *Pearson v. Component Technology Corp.*, 80 F. Supp. 2d 510 (W.D. Pa. 1999). On April 13, 2001, the United States Court of Appeals for the Third Circuit affirmed. *Pearson v. Component Technology Corp.*, 247 F.3d 471 (3d Cir. 2001).

B. Facts

In June of 1989, GE Capital made term loans and provided a revolving credit facility in the aggregate amount of $24,950,000 to Comptech and related borrowers. Comptech defaulted on principal and interest payments a little more than a year after the loans were made. On July 10, 1991, as a result of Comptech's repeated defaults, GE Capital called the loans and exercised its rights under the parties' loan and security agreements, including stock pledge agreements executed by Comptech's shareholders.

After GE Capital exercised its stock pledge rights, Thomas Gaffney, the chairman of Comptech's Board of Directors, was retained as the company's chief executive officer. Gaffney, who had extensive experience in the plastics industry, promoted Richard H. Brooks, Comptech's executive vice-president, to the position of president of Comptech.

On March 30, 1992, GE Capital sold all of the common stock of Comptech to entities controlled by Gaffney and Brooks. At or around the same time, GE Capital restructured its loans to Comptech to reflect the company's current financial situation and its diminished capacity to repay its loans. In the process, GE Capital wrote-off in excess of $20 million of Comptech's debt obligations. Comptech's remaining debt was restructured in the form of three term loans, a revolving line of credit, and preferred stock.

In 1994, Gaffney terminated Richard Brooks as president of Comptech and appointed Charles V. Villa as the company's new president. Gaffney had previously hired Villa as a consultant to Comptech. In June of 1994, Gaffney and Brooks sold all of their stock in Comptech to Villa.

After restructuring the account, GE Capital continued to support Comptech through additional loans and extensions of credit. Despite this financial support, Comptech was unable to return to profitability and financial health. Suspecting that the end was near, Comptech contemplated a plant closure and contacted its attorneys to inquire about WARN Act notification requirements. On September 23, 1994, Comptech and its subsidiary, Accu-Form, Inc. ("Accu-Form"), presented financial projections to GE Capital that demonstrated that Comptech and Accu-Form would need approximately $2 million in excess of their existing credit

line in order to meet the companies' working capital requirements for the remainder of 1994. Comptech and Accu-Form asked GE Capital to increase its funding to the companies and advised GE Capital that they had sought additional capital from other sources in the form of new loans and equity investments. By this time, Comptech and Accu-Form had also failed to pay principal and interest to GE Capital when due pursuant to the terms of the credit agreement between them, which gave rise to further defaults by Comptech and Accu-Form.

On or about October 7, 1994, GE Capital advised Comptech that it would not provide additional loans to Comptech and Accu-Form. Comptech's president, Charles Villa, informed GE Capital that, although Comptech continued to seek alternative sources of financing and capital from Citibank Venture Capital Limited and other possible sources of funding, Comptech had not been successful in obtaining alternative financing or any new equity commitment.

Thereafter, GE Capital and Comptech commenced negotiations concerning whether GE Capital would accept title to certain collateral in satisfaction of the then-outstanding indebtedness of Comptech and Accu-Form pursuant to section 9-505 (b) of the Pennsylvania Commercial Code, 13 Pa.C.S. § 9-505(b). Both Comptech and Villa were represented by counsel during these negotiations. On October 13, 1994, Comptech and GE Capital executed agreements, including an Asset Turnover Agreement, an Asset Retention and Purchase Agreement, and a Supplemental Funding Agreement. Pursuant to the Asset Turnover Agreement, Comptech surrendered to TIFD the assets it had pledged as collateral to GE Capital.

On October 14, 1994, without an alternative source of financing for Comptech's operations, Villa had no choice but to close Comptech's plant in Erie and inform all employees that they were being permanently laid off. Villa provided Comptech's employees with a formal notice of the plant closing dated October 14, 1994. Comptech was able to pay employees' accrued wages and vacation pay only because GE Capital had, in connection with negotiations regarding the consensual turnover of assets, agreed to advance additional loan funds, even though it had no obligation to do so.

Thereafter, TIFD conducted an orderly liquidation of Comptech's former assets. The proceeds of the liquidation were insufficient to satisfy Comptech's debts to GE Capital and, in 1996, GE Capital wrote-off the balance of Comptech's obligations.

REASONS FOR DENYING THE WRIT

In addition to the numerous departures from what the Rules of the Supreme Court of the United States require of Petitions for Certiorari, the Petition in this case fails to set forth any compelling reason to suggest that the decision of the Third Circuit merits the attention of the Supreme Court of the United States. Not only is the opinion of the Third Circuit well reasoned, rationally supported by the Department of Labor's findings and intent as set forth in the regulations, and grounded solidly in the record, the Petition fails to show that the ruling below conflicts in any meaningful way with the decision of another federal court of appeals. Further, the Third Circuit reasonably applied the five factors set forth in the Department of Labor regulations and used "relevant concepts of federal law" to substantiate its interpretation of

those factors. *See* 54 Fed. Reg. 16,045 (Apr. 20, 1989). Consequently, the Third Circuit has not "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10(a). Finally, the greater part of the Petition is devoted to the argument that the Third Circuit interpreted the Department of Labor factors as imposing too strict a standard. Simply put, Petitioners argue that the Third Circuit misapplied the Department of Labor factors and, instead, should have applied them in much the same manner that the National Labor Relations Board applies the "integrated enterprise" test. However, even if the Third Circuit did misapply the Department of Labor factors, the "misapplication of a properly stated rule of law" is an insufficient basis for granting a petition for a writ of certiorari. SUP. CT. R. 10.

I. The Decision Of The Third Circuit Does Not Conflict With The Decision Of Any Other Federal Court And Rests Upon Well-Established Principles Of Federal Labor Law.

With some exceptions, the WARN Act prohibits an employer of 100 or more employees from ordering "a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. § 2101(a)(2). An employer who violates the Act's notice requirement is liable to each aggrieved employee who suffers an employment loss for "back pay for each day of violation," 29 U.S.C. § 2104(a)(1)(A), up to a maximum of 60 days. 29 U.S.C. § 2104(a)(1). However, the WARN Act authorizes the imposition of this penalty only where the plaintiffs "demonstrate that the defendant is an 'employer'

responsible for the employment loss." *Chauffeurs Sales Drivers Warehouseman & Helpers Union Local 572 v. Weslock Corp.*, 66 F.3d 241, 243 (9th Cir 1995), *citing* 29 U.S.C. § 2102(a).

The WARN Act defines the term "employer" as "any business enterprise that employs . . . 100 or more employees." 29 U.S.C. § 2101(a). Consistent with this definition, the Third Circuit identified the question presented by this litigation as whether, under the facts of this case, GE Capital was Petitioners' employer. (Appendix A at 15a) Based upon the WARN Act's definition of "employer," the Third Circuit reasoned that Petitioners could prevail on their claim only if they established that GE Capital was a "single 'business enterprise' with Comptech such that it is responsible for Comptech's WARN Act obligations." *Id.*

After thoroughly reviewing the regulations and guidance issued by the Department of Labor, prior case law addressing "employer" status under the WARN Act, and national labor policy, the Third Circuit adopted the five-factor analysis of 20 C.F.R. § 639.3(a)(2) as the best articulation of the test for determining whether related entities are a single business enterprise under the WARN Act. This regulation provides that:

> Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership

> (ii) common directors and/or officers (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

20 C.F.R. § 639.3(a)(2) (hereinafter the "Department of Labor factors").

Both the Third Circuit in this case (Appendix A at 4a, 22a, 28a) and other courts of appeals have recognized that the Department of Labor factors are very similar to the "integrated enterprise" or "single employer" test for determining single employer status. *See, e.g., International Brotherhood of Teamsters Local 952 v. American Delivery Service*, 50 F.3d 770 (9th Cir. 1995). The integrated enterprise test, which was first developed by the National Labor Relations Board, looks to four labor-related characteristics of affiliated corporations: (1) common ownership; (2) common management; (3) centralized control of labor relations; and (4) interrelation of operations. *See, e.g., Radio & Television Broad Period Techs. Local Union 1264 v. Broadcast Serv. of Mobile*, 380 U.S. 255, 256 (1965) (per curium).

In *International Brotherhood of Teamsters Local 952 v. American Delivery Service*, 50 F.3d 770 (9th Cir. 1995), the Ninth Circuit noted the substantial similarity between the Department of Labor factors and the integrated enterprise test and applied these tests concurrently in affirming the entry of summary judgment for the defendant in that case. *Id.* at 776. The Ninth Circuit also observed that considerable overlap exists among not only the Department of Labor factors and the integrated enterprise test, but also state corporate veil-piercing doctrines. Under each of these

"control" theories of liability, the "basic point of inquiry is clear: Has [the defendant] structured its relationship with the [direct employer] in such a fashion as to control [the direct employer] and, at the same time, avoid [its own] obligations under federal law?" *Id.*

One commentator has observed that the integrated enterprise or single employer test and the Department of Labor factors represent essentially the same analysis. Cynthia Nance, *Affiliated Corporation Liability Under the WARN Act*, 52 Rutgers L. Rev. 495, 546 (2000). "[A] careful comparison of the two tests reveals that although they use different labels to describe the relationship between related entities, there is no real difference between the two tests." *Id.* The Department of Labor factors are merely an expansion of the four-factor single employer test. For example, the first Department of Labor factor is common ownership. This factor is identical to the first factor or the single employer test. Common directors and de facto exercise of control, unity of personnel policies, and dependency of operations are more specific indicia of common management, centralized control of labor relations, and interrelationship of operations. *Id.* Thus, there is no conflict between the Department of Labor factors and the integrated enterprise test.

The Department of Labor's "supplementary information" regarding its WARN Act regulations explains that the Department of Labor factors were not intended to create new rules for assessing the status of affiliated companies. 54 Fed. Reg. 16,045 (April 20, 1989). Instead, the Department of Labor factors were designed only to summarize existing law that has developed under statutes such as the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (West 2001), the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*

(West 2001), the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* (West 2001), and relevant principles of state corporations law. *Id.* This intent is further reflected in the substantial similarities between the Department of Labor factors and the integrated enterprise test.

Each court of appeals to address the subject has adopted either the Department of Labor factors or the integrated enterprise test, or regarded the tests as essentially the same, for purposes of assessing the status of affiliated companies under the WARN Act. No court of appeals has adopted the approach utilized by the district court in *Local 397, International Union of Electronic, Electrical Salaried Machine & Furniture Workers v. Midwest Fasteners, Inc.*, 779 F. Supp. 788 (D.N.J. 1992). In *Midwest Fasteners*, the district court analyzed the facts of the case under corporate veil-piercing principles as well as the integrated enterprise test and the DOL factors. *Midwest Fasteners* has been criticized for injecting state law concepts into a question of federal law. To the extent that *Midwest Fasteners* created uncertainty and possible conflict in the "employer" liability analysis under the WARN Act, the decision of the court of appeals obviated these problems by making it clear that *Midwest Fasteners* is not the law in the Third Circuit. Consistent with all other circuits, the Third Circuit has recognized that state law veil-piercing principles play a limited role in the determination of "employer" status under the WARN Act. Such state law concepts enter into the analysis only to the extent they are consistent with principles of federal law as reflected in the Department of Labor factors and the integrated enterprise test. (Appendix A at 42a).

The decision of the Third Circuit in this case is also consistent with *Adams v. Erwin Weller Co.*, 87 F.3d 269

(8th Cir. 1996) and *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union 572 v. Weslock Corp.*, 66 F.3d 241, 245 (9th Cir. 1995). Each of those cases addressed attempts by employees of defunct companies to impose liability upon secured lenders under the WARN Act based upon the lender's involvement with its borrower's business affairs. In each case, the court of appeals affirmed the entry of summary judgment in favor of the defendant lender. The Eighth and Ninth Circuits held that a lender can be considered an "employer" under the WARN Act only where the lender assumes a certain level of control over the management of the borrower. "Only when a lender becomes so entangled with its borrower that it has assumed responsibility for the overall management of the borrower's business will the degree of control necessary to support employer responsibility under WARN be achieved." *Adams*, 87 F.3d at 272. In determining whether the defendant assumed responsibility for the overall management of the borrower's business, the courts focused on the borrower's "functional operations." *Weslock*, 66 F.3d at 245. "Without some evidence showing [the lender's] involvement in the functional operations of the [borrower's] facility, there can be no finding that [the lender] is an employer under WARN." *Id.*

The Third Circuit criticized the Eighth and Ninth Circuits for placing too much emphasis on whether a lender's conduct relative to its borrower's business was "typical" of a secured lender. The Third Circuit noted that "typical" lender behavior is a "mutable concept" and that such conduct will respond to the liability rules that the courts put into place. (Appendix A at 41a). Therefore, the Third Circuit held that "although courts should attend to the customary relationship between lender and borrower (just as they have attended to customary relationships between parents and subsidiaries in determining liability), they should also make a functional assessment of the amount of control involved." (Appendix A at 41a).

These observations, however, do not evidence a conflict among the circuits as Petitioners contend. To the contrary, a review of the decisions of the Third, Eighth and Ninth Circuits reveals that they are in complete accord in all material respects. Both the Eighth and Ninth Circuits recognized that

> "the crucial question" [in determining whether a defendant was an employer under the WARN Act] is not the status of the defendant's legal relationship to the business but, instead, [whether] at the time of the plant closing or mass layoff the defendant [was] responsible for operating the business as a going concern.

Weslock, 66 F.3d at 244; *Adams*, 87 F.3d at 272. This inquiry parallels the "functional analysis" adopted by the Third Circuit as both approaches look beyond traditional indicia of corporate ownership to determine whether, as a matter of fact, one entity actually controls another in the operation of the business enterprise in the "normal commercial sense."

Petitioners' first argument is that the decision of the Third Circuit is in direct conflict with the Eighth and Ninth Circuits because "the Third Circuit applied the same test for lenders and affiliated corporations, which [the Eighth and Ninth] Circuits did not." (Petitioners' Brief at 5). In *Weslock*, the Ninth Circuit applied its "normal commercial sense" test to determine lender liability under the WARN Act. By contrast, in *International Brotherhood v. American Delivery*, 50 F.3d 770 (9th Cir. 1995), the Ninth Circuit applied the "single employer" or "integrated enterprise" test to determine affiliate liability under the WARN Act. However, despite their contention that the Third Circuit's decision is inconsistent

because it applies the same test for both affiliate and lender liability, Petitioners devote the greater part of their argument to the proposition that the same "integrated enterprise" test used by the Ninth Circuit for affiliate liability under the WARN Act should *also* be applied by courts in determining *lender* liability. This thinly veiled attempt to show inconsistency among the Circuits betrays the true reason Petitioners seek the Court's review. Petitioners appear to be dissatisfied with the Third Circuit's application of the Department of Labor factors as those factors require a more restrictive inquiry than would the integrated enterprise test. Although the Department of Labor easily could have adopted the integrated enterprise factors as the factors to be considered by courts in determining liability under the WARN Act, it declined to do so. Petitioners' dissatisfaction with the Third Circuit's application of the Department of Labor factors is insufficient to warrant the Court's review.

Petitioners' second argument is that the decision of the Third Circuit is inconsistent with the decision of the Ninth Circuit in *Weslock* because, although "both Circuits determined that a secured lender can be a WARN Act employer, the Ninth Circuit applied a different test. The Ninth Circuit determined that a secured lender can be liable under the WARN Act when it operates the business enterprise in the 'normal commercial sense.' " (Petitioners' Brief at 5, *citing Weslock*, 66 F.3d at 245). Petitioners also contend that the decision of the Third Circuit is at odds with the Eighth Circuit's decision in *Adams* because "the Eight[h] Circuit adopted the Ninth Circuit's test that a lender became a WARN Act employer when the lender operates the borrower's assets as a business enterprise in the normal commercial sense." (Petitioners' Brief at 6, *citing Adams*, 87 F.3d at 272). As explained below, however, the decisions of the Third, Eighth and Ninth Circuits are entirely consistent.

In *Weslock*, the Ninth Circuit considered whether the lender, through its agent, exercised complete control in the day-to-day operations of the borrower, such as participating in decisions concerning the borrower's production output, the marketing of the borrower's product, and the borrower's employment practices. *Weslock*, 66 F.3d at 245, *citing Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust*, 32 F.3d 1364, 1367 (9th Cir. 1994) (before a defendant can be an operator of a hazardous waste facility under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") the defendant "must play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management").

In this case, the Third Circuit explicitly stated that, other than the financial controls and stock interests incident to the loan agreement, "[GE Capital] had no formal authority to control Comptech's business decisions, including its strategic planning, its relationships with clients, its marketing, its product selection, its product design, or its quality control." (Appendix A at 12a). Similarly, when it applied the "dependency of operations" prong, the Third Circuit considered and rejected the Petitioners' contention that GE Capital, through Gaffney and Villa, exercised control over the day-to-day operations of Comptech through an "agency" relationship. (Appendix A at 53a). Specifically, in finding that the communications from Gaffney and Villa to GE Capital requesting additional financing to support certain large-scale expenditures and to release liens on certain assets were insufficient to support a finding of dependency of operations, the Third Circuit observed that GE Capital's approval or disapproval of these requests was nothing more than the exercise of "one of the defining rights of a secured lender: the right to prevent the transfer of collateral."

(Appendix A at 56a). Contrary to the Petitioners' contention, the Third Circuit did consider whether GE Capital had operated Comptech as a "business enterprise in the normal commercial sense" and concluded that it had not. The Third Circuit also noted that "the fact that Comptech independently sought additional financing from an outside lender to replace [GE Capital] cuts against a conclusion that Comptech was closely integrated with [GE Capital] itself." (Appendix A at 56a-57a). Put another way, the Third Circuit found that, as a matter of fact, Comptech and GE Capital were distinct entities and that as GE Capital did not exercise control over the day-to-day operations of Comptech, it did not operate Comptech as a business enterprise in the normal commercial sense.

Petitioners recognize that the Ninth Circuit's "normal commercial sense" test is equivalent to the Eighth Circuit's "entanglement" test. (Petitioners' Brief at 6). Petitioners also point out that the Eighth Circuit declined to decide how much "operational decision-making," or entanglement, it would take for a lender to be treated as an employer under the WARN Act. (Petitioners' Brief at 6). The Third Circuit's adoption of the Department of Labor factors as the test for lender and affiliate liability under the WARN Act clarified, in objective terms, the principles previously recognized by the Eighth and Ninth Circuits. The Third Circuit's decision is entirely consistent with the decisions of the Eighth and Ninth Circuits. All three courts engaged in substantially the same analysis, although the Third Circuit took a more analytical approach.

II. The Decision Of The Third Circuit Resolves Any Conflict Found To Exist Among The Circuits.

In its opinion, the Third Circuit recognized that

> the problem with creating a sharp distinction in liability rules under the WARN Act for lenders and for parents is that it will not always be clear when a party should be characterized as a "lender," when a party should be characterized as a parent or owner, and when a party occupies both roles.

(Appendix A at 37a). Therefore, "[t]he current trend toward applying more than one test is manifestly unworkable." (Appendix A at 28a-29a). Likewise, the Petitioners acknowledge the apparent "confusion surrounding affiliated and lender liability under the WARN Act" and invite the Court to clarify those issues. (Petitioners' Brief at 7). Petitioners then proceed to argue that the "inconsistency" arising from the Ninth Circuit's use of separate tests for affiliated liability and lender liability, and the Third Circuit's far more straightforward use of the five-factor test for both, warrants this Court's review. (Petitioners' Brief at 7-8). Notwithstanding the inherently contradictory nature of the Petitioners' argument, any alleged inconsistency is not sufficiently important to compel the Court's review. If, as they assert, the Petitioners seek clarification of affiliated and lender liability under the WARN Act, they need look no further than the Third Circuit's opinion.

The use of multiple tests to determine WARN Act liability generates considerable uncertainty. Parties potentially affected by the WARN Act will be reduced to

mere guesswork in determining which test probably applies. This uncertainty prevents lenders from accurately assessing their exposure to risk and, in borderline cases, may ultimately result in their refusal to extend financing to troubled business enterprises as they would be unable to adequately protect their investment without incurring WARN Act liability. The application of a single test for determining legal responsibility under the WARN Act obviates this need for speculation and provides lenders and affiliates alike with objective factors with which to assess the likelihood of liability. Additionally, it removes any disincentive for lenders to "rescue" financially troubled businesses and return them to profitability.

As the Third Circuit's decision notes, "[t]he [Department of Labor] factors are the best method for determining WARN Act liability because they were created with the WARN Act in mind and, unlike traditional veil-piercing and some of the other theories, focus particularly on circumstances relevant to labor relations." (Appendix A at 30a). The Third Circuit's decision resolves any confusion not only by applying a uniform test for WARN Act liability, but also by giving proper effect to the national labor policy considerations inherent in the WARN Act.

III. After Applying the Department Of Labor Factors, The Third Circuit Properly Concluded That GE Capital Was Not Liable Under The WARN Act.

In their complaint, Petitioners alleged that GE Capital "directly controlled all management decisions" of Comptech. In the proceedings in the district court, however, Petitioners were unable to produce competent or admissible evidence to support this allegation. This absence of evidence alone required the entry of summary judgment in favor of the

GE Capital Defendants. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (entry of summary judgment mandated where plaintiff fails to make a showing sufficient to establish the existence of an element essential to plaintiff's case, on which plaintiff will bear the burden of proof at trial).

Rather than rely exclusively on Petitioners' lack of evidence to defeat their claims, the GE Capital Defendants produced uncontradicted evidence to establish that Comptech's local managers, not GE Capital, operated and managed Comptech. This record included the depositions and affidavits of the individuals who served as Comptech's senior managers, including Comptech's president, plant manager, vice-president of operations, director of sales and marketing, controller and acting chief financial officer, vice-president of product and corporate development, and director of human resources. Comptech's managers testified that they managed and controlled the operations of Comptech, including its strategic planning, product selection, product design, manufacturing, quality control, inventory control, pricing, sales and marketing, personnel, finance and accounting, and customer relations. They also acknowledged that their contact with GE Capital consisted of routine reporting and interaction.

In applying the Department of Labor factors to the facts of this case, the Third Circuit concluded that, although Petitioners had submitted evidence sufficient to support the "common ownership" factor, the record could not support the remaining three factors of the analysis. Specifically, the Third Circuit determined that GE Capital and Comptech did not have common directors, officers, or other indicia of common management. In addition, the Third Circuit found no unity of personnel policies, no dependency of operations, and that GE Capital did not exercise de facto control over Comptech, including its decision to close its manufacturing facility in Erie.

The outcome of this case would have been precisely the same under the approach taken by the Eighth and Ninth Circuits in their respective WARN Act lender liability cases. Both the Eighth and the Ninth Circuits recognized that "the mere fact the loan documents give some control over the borrower to protect the lender's security interest does not automatically make the lender a WARN employer." *Adams*, 87 F.3d at 272; *Weslock*, 66 F.3d at 244. The Eighth Circuit further acknowledged that "lenders who loan large sums of money must be afforded substantial leeway in pursuing their bargained-for rights with a borrower in financial distress." *Adams*, 87 F.3d at 272-273. In this respect, the Eighth and Ninth Circuits, like the Third Circuit, apparently sought to avoid creating "a jurisprudence that discourages loans in general or rescues of troubled business enterprises in particular." (Appendix A at 56a.)

Finally, in applying their respective tests, both the Eighth and Ninth Circuits undertook an analysis almost identical to the "dependency of operations" and the "de facto exercise of control" factors considered by the Third Circuit. *Adams*, 87 F.3d at 271-273; *Weslock*, 66 F.3d at 244-245. Additionally, the Eighth Circuit briefly considered the "unity of personnel policies emanating from a common source" factor at the end of its opinion. *Adams*, 87 F.3d at 273. After considering these factors, both Circuits arrived at conclusions consistent with that of the Third Circuit. Given the identity of the considerations taken into account by the Third, Eighth and Ninth Circuits in formulating their respective opinions as well as the consistency of the outcomes, it cannot be refuted that the Eighth and Ninth Circuits would have arrived at results consistent with that of the Third Circuit in this case.

CONCLUSION

For all of the foregoing reasons, Respondents, General Electric Capital Corporation and TIFD VIII-R INC., respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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